November 05, 2010

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Ex Parte* Comments
MM Docket No. 99-25 (LPFM Proceeding)

Dear Ms. Dortch:

CircuitWerkes, Inc. and rfEngineers, Inc. have commercial FM translator applications pending in the Auction No. 83 FM translator filing window. We hereby comment upon, ***and offer alternatives to***, the revised Memorandum of Agreement submitted by Prometheus Radio Project ("Prometheus") and Educational Media Foundation ("EMF") in this MM Docket No. 99-25 (the "LPFM Proceeding").

We oppose the substantial procedural changes proposed by EMF and Prometheus because they harm the public interest and the interests of commercial radio broadcasters whose FM translator applications remain pending in Auction No. 83. They also harm non-commercial translator operators seeking to serve larger cities. Further, we believe that the proposed changes suggested by Prometheus and EMF will not produce the results that they are seeking. In these comments, we propose solutions that will produce far superior results while leaving the current translator applications largely intact.

BACKGROUND:

In the Memorandum of Agreement, EMF and Prometheus request that substantial changes be made midstream to the established rules and procedures for processing FM translator Auction 83 applications. EMF and Prometheus propose that all pending Auction 83 applications should remain on file but be subject to displacement by later-filed LPFM applications. Translator applicants would have the opportunity to settle only one pending application so that it could be granted. This was not part of the Auction 83 rules and was not in the Public Notice announcing Auction 83. Auction 83 already has rules in place to resolve application conflicts, particularly among commercial translator applications, which are the much smaller percentage of the total applications still on file.

Prometheus and EMF believe that their proposal benefits the public interest, convenience and necessity by allowing the maximum number of new LPFM stations in the shortest possible time-frame. Prometheus' main objections to permitting most of the auction 83 applications to continue processing are twofold:

1. The long processing times that resulted from thousands of application conflicts prevent opening up a new LPFM filing window. Prometheus is seeking the earliest possible opportunity for the FCC to open a new LPFM window.

2. Prometheus believes that, if the current batch of translator applications are processed, there will be no frequencies in major cities where new LPFM applications can be filed because most of the available spectrum will have been used by the translators.

We agree with Prometheus that resolving the auction 83 applications as quickly as possible is in the public interest, convenience and necessity. While Prometheus' assertion that there will be no frequencies available could be correct in some specific communities, we believe that the problem is very limited and it is not generally true across the entire country. We also disagree with Prometheus/EMF's proposed solution to resolving the auction 83 applications. We offer alternative suggestions that would allow for processing of most existing auction 83 applications while still allowing a new LPFM window to be opened in a very short time-frame while preserving plenty of spectrum for new LPFM applications.

DISCUSSION:

There are at least three serious problems with the Prometheus/EMF proposal.

First, neither Congress nor the FCC has established any criteria that makes or presumes LPFM to be a preferred service over translators. In fact, both services were intentionally made secondary services when established. Without changing that criteria, and opening the matter for public comment, it is inappropriate to displace one service with another, later service.

Second, the study cited by Prometheus, and conducted by Common Frequency, Inc. (Common Frequency) [1], presents absolutely no evidence that would suggest that the only channels available in most communities are already occupied by translator applications. In other words, the Common Frequency study did not attempt to discover if alternate channels would be available in various communities that would allow for new LPFM stations without putting translator applications in mutually exclusive situations. In fact, the Common Frequency report makes the unsupported assumption that all available channels are already used by existing translator applications. If it turns out that other channels are still available in many cities, then the bulk of the Common Frequency report is moot, as is the bulk of the Prometheus argument. Although there are some specific examples of spectrum monopolization, particularly in some of the largest cities, such as New York, no credible study proves, or even suggests, that LPFM stations would be shut out of most major cities by existing translator applications. It is therefore, premature and inappropriate to even consider displacing translator applications without first studying this. It is also noteworthy that the Common Frequency study is based on presumed rule changes that would drastically alter the conditions under which LPFM applications could be granted. We are unaware of any studies having been made using these proposed grant criteria. Unless the LPFM spacing rules are changed or replaced, the Common Frequency report is, again, moot.

Third, it is unreasonable and unfair to have applications from an earlier filing window displaced by a later one. We would also like to point out that most of the commercial applicants in auction 83 paid a $600 per application fee seven years ago and still have not had their applications processed. Changing the rules on these applicants more than 7 years after they paid for the processing of their applications would be unconscionable. This is especially true when many of the applications from Auction 83 could be quickly and easily resolved without taxing the FCC's resources.

In these comments we offer specific suggestions to remedy the monopolization of local spectrum without disrupting or seriously modifying the rest of the auction 83 process, or excessively taking up valuable FCC staff resources.

[1] See “Common Frequency LPFM-Translator Letter and Report (227)” MM Docket 99-25, submitted 09-28-2010

Prometheus & EMF believe that LPFM applications could displace translator applications in most, if not all communities, especially in larger cities. For most locations this belief is incorrect under the present rules. Under the present rules, LPFM applicants had an opportunity to place applications for all areas of the United States in the first filing window. The current spacing rules did not allow for placement of LPFM stations in areas with crowded spectrum. Nothing in the rules has changed since the first LPFM filing window, so most LPFM applications in larger communities will not be in conflict with translator applications because the requirements for siting LPFMs remain based on spacing rather than contours. Because LPFMs are barred from using contour methods, they are also not allowed to use directional antennas, such as those employed by translators. The result is that the majority of translators are pending in areas that are not suitable for LPFMs under the current rules. Prometheus & EMF presume that the LPFM rules will change to allow identical processing methods for LPFM and translator applications. This is far from certain because Congress must first remove the statutory limits on this and they have failed to act in the seven years since the Mitre report was published. Unless the rules are changed to allow contour methods for LPFMs, then relatively few translators will be displaced by new LPFM applications. The result will be that, while many translator applications could be displaced in smaller towns, Prometheus and other LPFM proponents will still not achieve their goal of getting community stations into the larger cities.

Much of the Common Frequency, Inc. study is moot because it assumes the use of contour methodology for LPFM applications, currently prohibited by Congress, to permit dropping in LPFM stations at locations currently held by translator apps. Aside from the ethical issues of allowing such a "land grab" and usurping of engineering data from the translator applications paid for by the translator applicants, Congress has made no change in the law that would permit contour methods to be used. Further, even if the law was changed to allow contour based LPFMs, the study does not address if LPFM stations might be able to exist on other channels that are not mutually exclusive to the existing translator applications. If one is to accept that contour based methodology will be permitted, then it is also reasonable to assume that Congress will also remove the limitation barring the FCC from removing the 3rd adjacency restrictions. Additionally, it is, at the least, plausible for the FCC to also remove the 2nd adjacent restrictions on the LPFM service. Under these conditions, it is unknown how many new frequencies would be opened, but a partial study of the Miami, Florida market, still based on LPFM spacing rules, with 2nd and 3rd adjacency restrictions removed, shows that 15 channels would become available without displacing any of the pending translator applications. Found frequencies were: 92.5, 92.7, 94.3, 94.5, 96.1, 97.7, 97.9, 98.7, 100.3, 101.9, 102.1, 102.3, 103.9, 105.5 & 106.3. Additional studies were performed in Tampa, Orlando and Jacksonville (Florida), Atlanta, Washington DC, Philadelphia and New York City. Multiple LPFM opportunities were found in all but NYC and Philadelphia. It is unknown how many more channels would be available if directional antennas were permitted, but we believe that the number would be considerable.

It is reasonable to expect that many LPFM stations will be able to exist in major cities across the United States without displacing any translators. It is in the best interest of the public for both services to be represented in major cities as each service has unique characteristics to offer.

In summary, Prometheus & EMF ***assume*** that all available frequencies are already used by translator applications, then ***presume*** that the law will be changed to allow LPFMs to use the same rules as translators. Neither of these is substantiated and it is likely that the assumption is incorrect while the presumption may, or may not, happen.

AN ALTERNATIVE APPLICATION CAP:

Prometheus is effectively advocating a de facto national cap of one translator per applicant, although they do leave room for the possibility that some additional existing translator applications, in particularly undesirable areas, may survive. While there is a chance that a very few LPFM stations might be placed into bigger markets by this method, the results on smaller markets would be devastating. Most translator applicants would choose to protect the translator applications in the largest markets first, leaving the smaller market translator applications to be displaced by LPFMs. In all markets, LPFM applicants would preferentially choose to use frequencies occupied by translator applications because the path-finding work has already been done by the translator applicants. LPFM applicants need only to copy the translator engineering to have a viable LPFM application. The result will be that smaller market translator applications will be displaced, wholesale, by LPFM applications, even in places where plenty of available spectrum exists for LPFM applications. We believe the goals of LPFM proponents can be more effectively and more equitably satisfied by the strategies outlined below.

It is true that some applicants, particularly in the top 10 markets, filed large numbers of applications to cover the same geographical area. For example, one applicant submitted 59 translator applications for Brooklyn, NY. We find it difficult to conceive of a public benefit from broadcasting the same program to the same population on dozens of frequencies. This amounts to monopolization of the local spectrum. This one applicant is responsible for completely blocking any possible LPFM applications in the vicinity of Brooklyn, NY. Under such conditions, very few LPFM applications can be filed since the local spectrum is monopolized by just a few (or one) applicants. Many non-commercial translators are intended to rebroadcast a station that is owned by the applicant. We agree with Common Frequency that a nationwide cap, like the one proposed by the FCC in 2008[2], would likely be ineffective at resolving the local monopolization of the spectrum. A national cap would also place unnecessary restrictions on other applicants that seek to build regional or national information services, particularly in rural areas.

[2] Media Bureau Invites Applicants to Select FM Translator Applications for Voluntary Dismissal to Comply with Processing Cap, DA 08-496, March 4, 2008

Instead of a national cap, we propose that non-commercial applicants with multiple overlapping translator applications (where one application's 60 dBu overlaps some portion of the 60dBu of another application, or existing facility, of the same applicant) should be subject to a cap of four overlapping applications per community. The local four-application cap would permit a broadcaster with the maximum of four HD channels to service the target community with all four of their programs. The FCC may wish to consider a similar cap on commercial applications, however, the number of similar commercial applications is a tiny fraction of the non-commercial duplicates and does not appear to be a major factor in spectrum monopolization within most communities. It should also be noted that commercial translator applicants usually propose to bring multiple stations into a community which is a public benefit. The local community cap would eliminate the bulk of the duplicated applications in places like Brooklyn, NY thereby creating many open slots for potential LPFM stations (assuming LPFM applications are ever allowed to use contour methods) without negatively impacting the majority of translator applicants nationally. This approach is far more efficient than a national cap would be because it releases more of the monopolized spectrum in places like New York, yet does so with the least damage to other broadcasters. The local cap combined with contour based LPFM siting and elimination of unnecessary 2nd and 3rd channel adjacency restrictions would result in the largest possible number of available new LPFM channels.

SPECIFIC PROPOSALS:

In addition to the alternative application cap described above, we propose the following:

§73.807 of the rules should be modified or rewritten to allow Desired-to-Undesired (D/U) analysis studies to demonstrate mutual protection between LPFMs and translators on adjacent channels. Between translators and LPFMs, 2nd and 3rd channel adjacency protection should be eliminated. These changes will allow many LPFM and translator facilities to co-exist in places where they have not previously been allowed. If the current 2nd and 3rd channel adjacency protections remain in effect, then D/U rules should be permitted to protect full-service stations on 2nd and 3rd adjacent channels.

In the closing moments of auction 83, an FCC computer or network problem caused about 50 commercial applicants' form 175 to not successfully file. The FCC staff recognized the problem and allowed these applications to remain on file. Several of these with singleton applications were permitted to file form 175 for their singletons when the applications were ready to be granted. The remainder of these applicants should be afforded the opportunity to pay for the rest of their applications and join the settlement process.

The following, six-step, course of action would resolve the majority of pending applications in the shortest time, in the most equitable way and with the least drain on FCC resources:

1. Prometheus and EMF suggested that the FCC open a settlement window to resolve translator conflicts. We agree that this is a logical first step, but without the limit of only one application. All translator applicants, both commercial and non-commercial (NCE), should be given a chance to settle or modify all of their facilities so as to resolve conflicts. Many conflicts can easily be resolved with minor engineering changes to one or both applications while others will be willing to settle and get out. If a cap on the number of applications per community is imposed, those applicants so affected should be given an opportunity to coordinate with each other during the settlement window to decide which facilities they will try to keep. This will allow them a chance to obtain the greatest number of grants, while still eliminating the overcrowding of affected communities. In some cases, applicants for facilities have died, disbanded or otherwise abandoned their applications, but those applications still remain on file. The longer the delay between the filing of applications and the opening of the settlement window, the more "orphaned" application there will usually be. Since the period of time is now approaching 8 years, a significant number of applicants may no longer be viable. As part of the settlement process, we propose that, upon submission of reasonable proof that an applicant is no longer viable, their applications should be dismissed. Reasonable proof could be the undeliverable return of certified mail, official dissolution of a corporation or LLC by the State where incorporated or other means as determined by the FCC. The settlement process for all parties will happen quickly and will result in a large list of singletons that can be granted with minimal FCC staff resources required.

2. All unsettled commercial applicants that are mutually-exclusive (MXd) only with NCE apps should be granted and the NCEs dismissed, resulting in another instant pool of singletons. Any NCE applications that are part of a broken daisy-chain would either be granted if newly singletons or remain on file if still MXd with other NCE applications. This step can be combined with step 1 above and, together, will resolve the majority of pending applications while using very minimal FCC resources.

3. All remaining commercial applicants that are MXd with other commercial apps should go to auction. This will eliminate all remaining commercial applications and result in a small pool of surviving applications which will be granted. As in step 2, any remaining NCE applications that are MXd with the auction winner should be dismissed while any that were part of a broken daisy-chain would either be granted if newly singletons or remain on file if still MXd with other NCE applications.

4. As soon as the commercial applications are disposed, the FCC can open a filing window for new LPFM applications. It would be most productive if new rules for LPFM stations are in place eliminating all 2nd and 3rd channel adjacency issues and also

permitting contour based applications. Any remaining MXd NCE apps stay on file and are subject to possible displacement by LPFM applications. This will allow LPFM applicants to begin the process quickly and they will be clear of most translator issues. If the FCC should decide that LPFM applications can displace translator apps, then LPFM applications should only be allowed to displace translator applications if no other channel is available for the LPFM. Translator applications subject to displacement by LPFM applications should be afforded an opportunity to relocate or change channels.

5. Surviving applications, which will be few, could then be subjected to a national application cap that would require applicants to choose a specific number of them that they elect to keep, this will dismiss the bulk of any remaining applications, leading to another quick round of grants to those still standing. This step may not be necessary because there is a chance that the number of remaining applications will already be insignificant by this stage.

6. The few surviving NCE applications may remain on file until the FCC decides on an appropriate procedures and criteria to dispose of them.

We believe that neither the national cap limit proposed by the FCC nor the de facto one application cap proposed by Prometheus and EMF are the most efficient methods for opening spectrum for potential LPFM applications. The methods proposed in these comments would, in our opinion, best resolve the bottleneck of translator applications while preserving plenty of spectrum for LPFM use with minimal collateral damage.

Accordingly, it is requested that the Commission proceed with the six-step process outlined above and that the suggested LPFM rule changes be adopted at the earliest possible moment so as to allow for maximum placement of new LPFM stations.

Respectfully submitted,

Signed: Kyle Magrill
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CircuitWerkes, Inc.

Signed: Joseph DiPietro
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rfEngineers, Inc.